



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM OF LAW

TO: Don Erickson, DHS

DATE: May 2, 2019

FROM: Ellen Mendoza, Senior Assistant Attorney General
Health and Human Services Section

SUBJECT: Immigration Status of Child Care Providers Funded by Employment Related
Daycare (ERDC) Program

DOJ File No. 100001-GH 1778-18 (DM#9468965)

Question Presented:

Is there a statutory requirement to determine the legal citizenship of a childcare provider eligible for Employment Related Day Care (ERDC) payments?

Brief Answer:

No. The ERDC program is funded by the Federal Child Care Block Grant Act (Act).¹ No requirement in the Act addresses the citizenship of the childcare provider. Instead the Act focuses solely on the citizenship status of the child to be served. The providers must pass criminal and abuse background checks, and are subject to inspection and training requirements by the State. Further, the collective bargaining agreements between childcare providers and the State of Oregon do not make the State an employer of those providers, triggering any immigration verification requirements.

Discussion

1. Introduction

This memo discusses the legal validity of childcare providers being paid through the ERDC program, without first determining their immigration status. The question includes whether DHS is the employer of the childcare provider and must determine citizenship, as required of all employers through the Immigration Reform and Control Act of 1986 (IRCA).³ This memo analyzes whether DHS is subject to any statute or regulation that would require it to

¹ 42 U.S.C. §9858 *et seq*

³ Public Law 99-603, 8 USC §1324a

obtain such information from ERDC providers. A request for a legal memo by DOJ on this topic was made by DHS in mid-December, 2018. A first draft was delivered in mid-March 2019.

2. Statutory history of federal child care grants.

ERDC is a program funded by the Federal Child Care and Development Fund (CCDF). On November 19, 2014, President Barack Obama signed the Child Care and Development Block Grant (CCDBG) Act of 2014⁴ into law following its passage in the 113th Congress. The CCDBG Act, as amended⁵ (and hereinafter referred to as the “Act”), along with Section 418 of the Social Security Act⁶, authorizes the Child Care and Development Fund (CCDF), which is the primary federal funding source devoted to providing low-income families who are working or participating in education or training activities with help paying for child care and improving the quality of child care for all children.

Previous versions of the law providing for child care funds were part of the Omnibus Budget Reconciliation Act of 1990 and then the Personal Responsibility and Work Opportunity Act of 1996. The CCDBG Act made \$8.1 billion available to states, territories, and tribes in fiscal year 2018.⁷ Final regulations to implement the new authorization were issued on September 30, 2016 and effective on November 29, 2016, at 45 CFR § 98 et seq.⁸

3. ERDC are benefits of the child and therefore only the child’s citizenship must be determined under the Act.

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) restricts the benefits that states and the federal government may provide to certain aliens residing in the United States.⁹ Under the PRWORA, subject to certain exceptions, an alien who is not a qualified alien may not receive a federal or state public benefit.¹⁰ An “alien” is a person who is not a citizen or national of the United States.¹¹ An alien who is not lawfully present in the United States is not a qualified alien.¹²

Under PRWORA, a federal public benefit is:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

⁴ [Pub. L. 113-186](#)

⁵ [42 U.S.C. 9858](#) *et seq.*,

⁶ [42 U.S.C. 618](#)

⁷ <https://www.acf.hhs.gov/occ/fact-sheet-occ>.

⁸ [81 Federal Register 67438](#)

⁹ Public Law 104-193.

¹⁰ 8 USC §§ 1611(a) and 1621(a).

¹¹ 8 USC § 1101(a)(3).

¹² 8 USC § 1641(b). A qualified alien includes an alien who is lawfully admitted for permanent residence, who has been granted asylum, who is a refugee, who has been paroled into the United States for a period of at least one year, who has been granted conditional entry, or whose deportation is being withheld.

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.¹³

Similarly, a state public benefit is described as:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.¹⁴

Payments under the ERDC program are benefits that come from a federal program. However, the 2016 final regulations are specific that it is the child who receives the child care and therefore must be a U.S citizen or legal alien. The citizenship status of the parent or other members of the household are disregarded. The regulation states:

For purposes of implementing the citizenship eligibility verification requirements mandated by title IV of the Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. 1601 *et seq.*, **only the citizenship and immigration status of the child, who is the primary beneficiary of the CCDF benefit, is relevant.** Therefore, a Lead Agency or other administering agency may not condition a child's eligibility for services under § 98.50 based upon the citizenship or immigration status of their parent or the provision of any information about the citizenship or immigration status of their parent.¹⁵

(Emphasis added.) Looking only at the citizenship of the child for child care funds had been the official federal policy since 1998,¹⁶ but the new regulations now make the policy explicit. Therefore, the actual ERDC funds are considered the child's benefits, not the parents.'

A final question is if the ERDC subsidy is a benefit to the child, as described in the regulation cited above, does the childcare provider nonetheless receive a benefit from being an ERDC provider, such as a commercial license or contract? Under the relevant rules¹⁷ describing provider responsibilities, it is clear that there is no such formal relationship. The rule that primarily sets the administrative requirements for receiving the subsidies is at OAR 461-165-

¹³ 8 USC § 1611(c).

¹⁴ 8 USC § 1621(c).

¹⁵ [45 CFR 98.20\(5\)\(c\)](#)

¹⁶ See ACYFP1-CC-98-08 at <https://www.acf.hhs.gov/occ/resource/pi-cc-98-0>

¹⁷ <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=255239>

0180. After describing the needed qualifications, the result of being approved is merely to become part of the list of approved providers who is then selected by the parent(s) to provide childcare. Review of the application form indicates that it creates no contract or license.¹⁸ Thus, there is no benefit provided to a childcare provider for purposes of PRWORA that would trigger a citizenship inquiry.

4. Under the Act, child care providers are subject to background checks.

Although the immigration status of providers is not a focus of the new Act, it does require criminal background checks for all providers, and the regulations make those requirements explicit.¹⁹

Note that the federal statute specifies how the background checks should be conducted, by the use of state and federal databases:

- (b)Requirements. A criminal background check for a child care staff member under subsection (a) shall include—
- (1) a search of the State criminal and sex offender registry or repository in the State where the child care staff member resides, and each State where such staff member resided during the preceding 5 years;
 - (2) a search of State-based child abuse and neglect registries and databases in the State where the child care staff member resides, and each State where such staff member resided during the preceding 5 years;
 - (3) a search of the National Crime Information Center;
 - (4) a Federal Bureau of Investigation fingerprint check using the Integrated Automated Fingerprint Identification System; and
 - (5) a search of the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901 et seq.).

The adoption of clear standards to check all providers for criminal and abuse history indicates that Congress considered the safety of providers to be a serious concern. Note that there is no check for citizenship included in the required background check.

5. State plans under the Child Care Block Grant Act demonstrate federal approval.

Following reauthorization of the Act, Oregon's plan under the Act was approved from 2016-2018,²⁰ and conditionally approved from 2019-21.²¹ The current plan emphasizes that

¹⁸ https://aix-xweb1p.state.or.us/es_xweb/DHSforms/Served/de7494d.pdf
<https://www.oregon.gov/DHS/ASSISTANCE/CHILD-CARE/Pages/Providers.aspx>

(Last viewed March 13, 2019.)

¹⁹ [45 CFR 98.43](#)

²⁰ <https://www.acf.hhs.gov/occ/resource/state-plans>

²¹ https://oregonearlylearning.com/wp-content/uploads/2019/01/STPLAN_APPROVAL_2019.pdf

citizenship or legal immigration status of the child is the only immigration verification that is required.²²

6. Oregon law does not address the issue of child care provider's immigration status.

Oregon statutes which reference the federal child care programs are brief and scattered. For example, ORS 410.610 has the following:

It is the goal of the Legislative Assembly to provide programs to make child care services more affordable, to improve the quality of services offered and to increase the number of child care providers. Programs should be tailored to the needs of local communities and should include a combination of actions that will address both targeted populations, such as teen parents or children with disabilities, and low-income working or student parents.

This policy statement is all that remains of the longer statute enacted in 1990 when the federal Child Care Block Grant was first implemented in Oregon. At that time the Department was the lead agency administering the funds.²³

ORS 411.122 addresses payment under ERDC to childcare providers: "The Department of Human Services shall provide dependent care payments directly to dependent care providers for eligible families." Note that this statute has been in effect since 1989. Further, OAR 461-165-0180 states a number of requirements that child care providers must meet, yet none of them involve verifying citizenship.²⁴

Of more direct relevance to the ERDC participants, is the newer statute, ORS 329A.500, enacted after the 2014 Act went into effect, which states the principles of providing services to the families receiving the ERDC subsidy, but does not directly address providers."²⁵ However,

²² https://oregonearlylearning.com/wp-content/uploads/2019/01/OR.StatePlan.2019_11.07.18.pdf (see p.86)

²³ See Or Law s 1991c.697§1

²⁴ <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=255239>

²⁵ **329A.500 Subsidy programs; rules.** (1) The Department of Human Services, in consultation with the Early Learning Division and the Office of Child Care, shall adopt rules for the operation of subsidy programs for employment-related child care administered by the department. At a minimum, and taking into account the availability of funds, the rules must provide the following:

(a) Subsidy recipients may be entitled to receive the subsidy for at least one year, regardless of changes in employment. Rules adopted by the department may provide for termination of subsidy eligibility for reasons other than changes in employment during the one-year period. Exit eligibility and copays must be structured to mitigate the financial impact of reduced subsidy support due to increased income.

(b) Subsidy recipients who are enrolled in coursework, as defined by the department by rule, may be entitled to receive the subsidy to enable the subsidy recipient to attend and participate in the coursework provided all other eligibility requirements are met.

(c) Persons who are self-employed may qualify for subsidy programs provided all other eligibility requirements are met.

(d) Subsidy recipients who voluntarily choose child care providers that meet minimum standards established under the tiered quality rating and improvement system implemented under ORS 329A.261 may qualify for lower copayments. A fair representation of the subsidy recipients who qualify for lower copayments must be persons with

ORS 329A.505, gives the Office of Child Care, in the Department of Education, the obligation to conduct inspections of providers who would otherwise be exempt from licensing.²⁶ Thus, these statutes focus on the federal mandates for all child care providers to have background checks and be subject to inspection. There is no mention of provider citizenship status as an interest under either the federal or state laws. Pursuant to a 2017 statute, ORS 180.805 (2), if there is no requirement under state or federal law, “a public body may not inquire about or request information concerning a person’s citizenship or immigration status.”²⁷

7. Collective bargaining by child care providers does not create an employee/employer relationship.

In 2005, Governor Kulongoski signed Executive Order 05-10,²⁸ which ordered DHS, the Employment Department, and AFSCME Council 75 to meet on behalf of certified and registered family child care providers, regarding issues of mutual concern. “Such issues of mutual concern may include, but are not limited to, training and certification requirements, reimbursement rates, payment procedures....” This first effort was followed in 2007, with the passage of 2007 Or Laws ch.563 (SB788), which established collective bargaining rights between the union which represented child care providers and DHS. This statute is ORS 329A.430.²⁹

ORS 329A.430 was a groundbreaking law because it gave collective bargaining rights over the payment of subsidies managed by DHS, rather than wages. Thus, it was very careful to state the limits of the statutory authority.

(2) For purposes of collective bargaining under ORS 243.650 to 243.782, the State of Oregon is the public employer of record of family child care providers.

children who are from underserved racial, ethnic or minority populations. In addition, child care providers that meet specified minimum standards established under the tiered quality rating and improvement system may receive an enhanced reimbursement under the subsidy programs.

(e) Subsidy recipients must report a change of child care provider to the department during the period a subsidy is being received.

(2) The department shall work to meet federal recommendations for income eligibility and market access in regard to employment-related child care administered by the department. [2015 c.698 §1]

²⁶ **329A.505 On-site inspections; federal law requirements.** (1) The Office of Child Care may visit and conduct on-site inspections of the premises of an exempt child care provider as defined by the Office of Child Care by rule whenever such inspections are required under federal law. The inspections may be conducted at any reasonable time and shall be limited to making a determination as to whether the requirements of applicable federal law have been met.

(2) The Office of Child Care may, as a condition of finalizing the inspection, require improvements, corrections or other measures to ensure that the exempt child care provider complies with the requirements of federal law for exempt child care providers. [2015 c.698 §2]

²⁷ Or Laws 2017, ch.724 (HB 3464).

²⁸ https://www.oregon.gov/gov/Documents/executive_orders/EO0510.pdf

²⁹ https://www.oregonlegislature.gov/bills_laws/ors/ors329A.html

(3) Notwithstanding ORS 243.650 (19), family child care providers are considered to be public employees governed by ORS 243.650 to 243.782. Family child care providers have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining on matters concerning labor relations. These rights shall be exercised in accordance with the rights granted to public employees, with mediation and interest arbitration under ORS 243.742 as the method of concluding the collective bargaining process. Family child care providers may not strike.

(4) Notwithstanding subsections (2) and (3) of this section, **family child care providers are not for any other purpose employees of the State of Oregon or any other public body.**

(Emphasis added.) The legislators were very concerned about making sure that this law did not impose any duties of an employer on the State of Oregon, other than the right of collective bargaining, as those responsibilities would be many and costly. There are current union contracts which cover the different types of providers.³⁰ Nothing in those contracts indicates an employer/employee relationship between the provider and DHS.

8. The responsibility to verify immigration status applies to employers with respect to employees.

The Immigration Reform and Control Act of 1986 (IRCA)³¹ prohibits employers from knowingly hiring unauthorized aliens and hiring individuals without completing the employment eligibility verification process. This act led to creation of Form I-9, Employment Eligibility Verification. All employers must use Form I-9 for all employees hired on or after Nov. 6, 1986, who are working in the US. As the discussion above demonstrates, DHS is not the employer of the childcare providers who obtain reimbursement through ERDC. The statute which allows collective bargaining for childcare providers specifies that Oregon is only considered an employer for collective bargaining purposes only and is not an employer for other purposes. Therefore IRCA requirements do not apply to DHS with regards to child care providers.

9. Conclusion

Oregon administers the subsidy child care payments from the Federal Child Care Block Grant Act by direct payments to the providers, as it has done since 1989. The regulations of the Act make clear that the child is the beneficiary of the Act and the child is only individual who must demonstrate citizenship under PRWORA, which has restricted federal and state benefits to citizens and legal aliens since 1996. Therefore, under the Act and PRWORA, there is no

³⁰

<https://www.oregon.gov/das/HR/CBA/AFSCME%20Non%20State%20Childcare%20Providers%20Together%2017-21.pdf>

<https://www.oregon.gov/das/HR/CBA/SEIU%20Non%20State%20Child%20Care%20Providers%2015-19.pdf>

³¹ Public Law 99-603, 8 USC §1324a

Don Erickson, DHS

May 2, 2019

Page 8

requirement to inquire into the citizen or alien status of child care providers. Further in 2007, Oregon enacted limited collective bargaining rights for child care providers who are eligible for those subsidies. By statute, Oregon is not the employer of those providers, except for collective bargaining purposes. Thus, DHS has no responsibility as an employer to determine the immigration status of the providers.